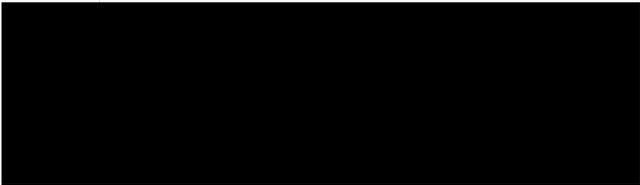




U.S. Citizenship
and Immigration
Services



D7

FILE: SRC 03 202 50259 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



MAY 21 2004

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

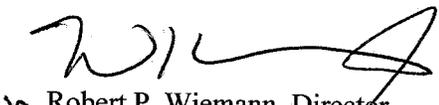
ON BEHALF OF PETITIONER:



preventing clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

PUBLIC COPY

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an importer and distributor of food products. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary has been or would be employed in a primarily managerial or executive capacity. On appeal, counsel disputes the director's findings and submits additional information to support the appeal.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The issue in this proceeding is whether the petitioner has submitted sufficient evidence that the beneficiary has been and will be performing primarily managerial or executive duties.

Section 101(a)(44)(A) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the initial petition, the petitioner stated that it is a wholly-owned subsidiary of Colombiana de Deshidratados S.A., located in Colombia. It claimed that it is currently involved in importing and distributing products produced by its parent company, as well as other Colombian companies. The petitioner provided the following description of the beneficiary's duties:

As the highest-ranking officer of [the petitioner], [the beneficiary] will continue to be responsible for directing the management of [the petitioner], including planning, developing and establishing policies and objectives for the company. I will also continue to be involved in the daily activities with the marketing and importing of the food products.

As president, [the beneficiary] will review activity reports and financial statements to determine progress in attaining objectives and contribute to the revision of plans in accordance with changing conditions. [The beneficiary] will be responsible for overseeing all aspects of our operations and maximizing our company's profitability and growth.

The petitioner submitted several recent payroll documents indicating that it currently has three employees, including the beneficiary; and provided recent invoices from Jose Mena, the petitioner's customhouse broker, Santana and Associates, the petitioner's sales representative, and Verlix, Inc., the petitioner's products handler.

On August 28, 2003 CIS issued a notice of its intent to deny the petition and asked the petitioner to submit additional evidence explaining how the beneficiary will avoid primarily performing day-to-day operational tasks.

The petitioner responded with a statement explaining that the beneficiary has been and will continue to act as a function manager. The petitioner stated that the beneficiary manages the importation, distribution, and marketing functions and claimed that it has two employees and several independent contractors who handle the day-to-day operational tasks. The petitioner provided CIS with the names of its employees, their job duties, and the list of contractors who carried out the petitioner's day-to-day operational tasks, as well as the specific service each contractor provides. As proof of its use of outside contractors, the petitioner provided invoices from various contractors billing the petitioner for services rendered. In regard to the beneficiary's duties the petitioner provided the following statement:

[The beneficiary] is responsible for overseeing all aspects of our operations and maximizing our company's profitability and growth and has autonomous control over, and exercises wide latitude and discretionary decision-making in, establishing the most advantageous courses of action for the successful management and direction of [the petitioner]. . . .

The director denied the petition noting that the beneficiary cannot be primarily performing managerial or executive duties because he is not managing other professional or managerial employees. This finding is inappropriate as it fails to take into account the petitioner's claim that the beneficiary is a function manager rather than a personnel manager. Therefore, the AAO withdraws the director's comment.

Nevertheless, the director properly concluded that the petitioner failed to establish that the beneficiary would primarily be performing managerial or executive duties. On appeal, and throughout this proceeding, the petitioner has maintained that the beneficiary oversees the work of others in an effort to manage the essential functions of importing and distribution. The petitioner also provides detailed descriptions of the duties performed by the two employees working directly under the beneficiary, as well as the duties performed by the independent contractors. However, the petitioner has never clarified what duties the beneficiary actually performs on a daily basis. Merely stating that his primary responsibility was to oversee the independent contractors does not clarify what duties are involved in such oversight.¹

Furthermore, counsel repeatedly asserts that the beneficiary will not be performing the day-to-day operational tasks because there are others who carry out these tasks. However, the petitioner does not affirmatively specify what the beneficiary has been and will actually be doing. The AAO cannot assume that the beneficiary is not directly involved in carrying out the petitioner's daily operational tasks just because there are other employees and contractors who do so as well. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the instant case, the petitioner has failed to provide the AAO with a comprehensive list of the beneficiary's job duties. As such, the AAO cannot make the determination that the beneficiary's duties are primarily managerial or executive. For this reason this petition cannot be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

¹ The petitioner also filed an I-140 immigrant petition for classification as a multinational manager or executive. In that record of proceeding (with receipt number SRC0218151378) the petitioner provided a lengthy job description, which the AAO has addressed in an appellate decision related to that petition. It is noted, however, that the immigrant petition was filed more than one year prior to filing date of the instant petition. Therefore, consideration in this case will be given only to the information and documentation presented in the record of proceeding related to the non-immigrant petition.